

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 895 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

BHARWAD BHIMA RAM

Versus

PATEL MADHUBHAI VIRJIBHAI

Appearance:

MR PV HATHI for Petitioners
MR TM THAKKAR for respondent.

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 10/11/2000

ORAL JUDGEMENT

1. The appellants- original defendants have preferred this appeal challenging the judgment and decree dated 21st January 1980 passed in Special Civil Suit No. 62 of 1977 by the learned Civil Judge, Senior Division, Amreli, whereby the learned judge was pleased to partly

allow the suit preferred by the respondent- original plaintiff. The appellants were ordered to pay to the respondent an amount of Rs. 15,000/- with interest at the rate of 6% p.a. from the date of filing of the suit till realisation. The learned judge dismissed the suit in respect of an amount of Rs. 9,250/-.

2. The respondent averred in the said suit that the appellants no. 1 to 4 are the real brothers and the appellant no.5 is their mother. All were residing jointly and all of them jointly owned three pieces of land bearing survey no. 225 paiki, admeasuring 8 acres 33 gunthas, 10 acres 10 gunthas and 2 acres 38 gunthas. All these three pieces admeasured 22 acres 29 gunthas. The appellants agreed to sell the said land for a consideration price of Rs. 38,290/- to the respondent and accordingly banakhat dated 16.4.1975 was executed in favour of the respondent by the appellants. On the day of execution of the banakhat, the respondent paid to the appellants an amount of Rs. 15000/- in respect of which a note has been made by the appellants in the agreement to sell. It is the further case in the plaint that over and above this amount, the respondent paid Rs.2,750/- more. As provided in the banakhat, the appellants took the responsibility to convert the land in question from new tenure to old tenure as the land being of new tenure, it could not be sold out. It was further provided that the arrangement for converting the land as stated above was to be made within six months from the date of execution of the agreement to sell. The appellants also agreed to return the earnest money if they failed to convert the land into old tenure land.

It was further averred that on 8.7.1975, the respondent paid Rs. 7000/- more towards the earnest amount and a writing to that effect was executed by the appellants. Thus, in all, the respondent paid Rs. 24,750/- to the appellants. As stated in the banakhat, the possession of the suit land was handed over to the respondent and the respondent thereafter in the next monsoon season had sown crop in the land, but when the crop had ripen, the associates of appellants and persons from whom the appellants had purchased the land, as told by them, took away the crop on the suit land forcibly in his absence and took over possession of the land. The respondent informed the appellants about this, but the appellants did not try to return the possession and did not stop this obstruction in the possession of the respondent. According to the respondent, the appellants have not converted the land into old tenure land as stated above even after expiry of six months and,

therefore, the notice dated 16.10.1975 was served to them and, therefore, the appellants have committed breach of the agreement and have made performance of the agreement impossible and, therefore, the appellants are liable to return earnest money of Rs. 24,750/-together with interest at the rate of 9% p.a.

3. All the appellants in their joint written statement denied various averments made in the plaint. The appellants, however, have admitted that after the execution of banakhat, Rs. 15,000/- were received by them as earnest money amount and a mention to that effect has been made in the agreement, but it is not admitted by them that over and above the said amount of Rs. 15,000/-, the respondent made payment of Rs. 2,750/more to them and it is also not true that the earnest money amount of Rs. 38,920/- was shown in the banakhat because the settlement i.e. "Sauda" was made for a consideration of Rs.40,000/- and towards that amount, only an amount of Rs. 15000/- was paid by the respondent. According to them, the suit land was an old tenure land from the beginning and, therefore, there was no question of converting it into old tenure land. Therefore, if the suit land was an old tenure land, there was no question of their returning earnest money to the respondent. It is further stated that the original agreement is with the respondent and if it is written in it about the nature of the land, then the respondent must have joined hand with the author of the agreement and got an agreement written by them by committing fraud and, therefore, these averments, if made in the agreement, are not binding to them. In substance, the appellants have denied the averments made in the plaint except the averment regarding payment of Rs. 15000/- having been received by them being the earnest amount.

4. After appreciating the oral as well as documentary evidence on record, the learned trial judge partly allowed the suit to the extent of awarding Rs. 15000/- in favour of the respondent. However, dismissed the claim with respect to Rs. 9,750/- as prayed for by the respondent. The appellants have challenged the said judgment and decree by way of the present appeal.

5. The respondent has not filed cross objections in respect of the amount not awarded to him and, therefore, the findings recorded by the trial court with respect to the amount of Rs. 9,750/- have become final and binding to the respondent.

6. Mr.D.M.Mehta, learned Counsel appearing for the

appellants has challenged the impugned judgment on various grounds. It was contended that the learned judge, after holding that the appellants had no clear marketable title in respect of the said piece of land of 8 acres 33 gunthas on the date of execution of the suit agreement, ought to have held that the appellants were not in a position to perform their part of agreement and ought to have dismissed the suit in toto. It is further contended that there was a clear clause in the suit agreement that the possession of the suit land was handed over to the respondent on the date of the suit agreement and that there was a clear admission by him in his evidence that he was dispossessed by one Jorubha and, therefore, the appellants cannot be made liable to make refund of the amount of earnest money. Finally, Mr. Mehta submitted that the learned judge ought to have passed a conditional decree to the effect that the appellants shall pay Rs.15000/- which they had received by way of earnest money as and when the respondent hands over the possession of the suit land to them.

7. Mr. Thakkar, learned advocate for the respondent, on the other hand, supported the judgment of the trial court in toto.

8. With a view to ascertain the factum of possession of the respondent in respect of the suit land, with the consent of parties, by an interim order dated 29th September 2000, I had called upon Talati-cum-Mantri of village Gavadka of Amreli Taluka to produce village form no. 7/12 of survey no. 225 paiki admeasuring 22 A.29 G. giving details of the persons occupying and cultivating the said land since 1975-76 till date. In compliance with the said order, one Rameshgiri Shantigiri Gosai, Talati-cum-Mantri of village Gavadka has produced village form no. 7/12 of survey no. 225 paiki admeasuring 22 A. 29 G. which was taken on record. Perusing the same, it is clear that after 1975-76 onwards, nobody much less respondent is occupying the said land as the village record shows that the land in question is a Government waste land. This fact will go to support the case of the respondent, namely that he was dispossessed by the associates of the appellants who took away the crop on the suit land forcibly in his absence and took over the possession of the land in the year 1975 and, therefore, he was required to file a suit to return an amount of Rs. 24,750/- together with interest. The aforesaid fact would further reveal that the appellants had no clear marketable title in respect of the said piece of land admeasuring 8 A.33 G. on the date of execution of the suit agreement. In this view of the matter, there is no

question of passing any conditional decree to the effect that the appellants shall pay Rs. 15000/- which they had received by way of earnest money as and when the respondent hands over possession of the suit land to them. Since the appellants have admitted that they have received Rs. 15000/- at the time of execution of banakhat from the respondent, in my opinion, the learned trial judge was justified in passing the decree for an amount of Rs. 15000/- with interest at the rate of 6% in favour of the respondent. The respondent claims to have paid Rs. 2,750/- subsequent to the banakhat and a further amount of Rs. 7000/- on 8.7.1975 towards the earnest money, in all Rs. 24,750/- to the appellants. The learned trial judge, after appreciating the evidence on record, has not accepted the subsequent payment made by the respondent and, therefore, dismissed the claim of the respondent with respect to the amount of Rs. 9,750/-. Since the respondent has accepted the said finding by not filing cross objections in the present appeal, the said finding has become binding to the respondent. In this view of the matter, it is not necessary for me to consider the claim with respect to the balance amount of Rs. 9,750/- made by the respondent. In the circumstances, I do not find any substance in this appeal.

In the result, this appeal fails and is dismissed with costs.

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